2026 Hfx No.

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: The Receivership of Kooshie Cushions of Canada Limited

Between:

Business Development Bank of Canada

Applicant

and

Kooshie Cushions of Canada Limited

Respondent

WRITTEN SUBMISSION
OF THE APPLICANT

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Service List.

1. This is the submission of the Applicant, Business Development Bank of Canada ("**BDC**") for, *inter alia*, an order: (i) abridging time, if necessary, and (ii) appointing Deloitte Restructuring Inc. ("**Deloitte**") as Receiver and Manager of all the property, assets and undertaking of Kooshie Cushions of Canada Limited (the "**Company**") pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**") and section 43(9) of the *Judicature Act*, RSNS 1989, c. 240, as amended (the "**Judicature Act**").

A. Concise Statement of Facts

2. BDC has filed the affidavit of Marius Cassie in support of this application in chambers.

3. On or about October 16, 2024, the Company applied for and was approved for a loan in the amount of $3,500,000.00 with interest charged thereon at 7.40% per annum. This loan was amended from time-to-time.

4. The security for that loan is as follows:

    (a) mortgage and assignment of rents in favour of BDC which was recorded on January 10, 2025, against the property located at 339 Willow Street, Truro, Nova Scotia, more particularly described as parcel identification number 20239059;

    (b) personal guarantee signed by Mark Shelley and a corporate guarantee signed by Sun Kissed Energy Incorporated ("**Sun Kissed**") on January 10, 2025;

    (c) general security agreement signed by Sun Kissed, which was registered under the *Personal Property Security Act*.

5. The Company defaulted under the terms and conditions of the mortgage and assignment of rents.

6. On April 7, 2026, BDC forwarded a demand letter and notice of intention to enforce security to the Company and the guarantors. The amount in default on that date was $2,565,282.75 plus interest and professional fees because the Company is in default of its obligations of payments.

7. On April 24, 2026, BDC appointed Deloitte as the private receiver. The Company has failed to cooperate with Deloitte.

8. On May 6, 2026, the Company provided a response to the demand letter and notice of intention to enforce security. BDC responded to the Company on May 19, 2026. No further letters have been exchanged on this issue.

9. The default has not been cured, and the Company has not cooperated with Deloitte.

B. Issues

10. Should this Court abridge the time for service and, if so, appoint Deloitte as the Court-appointed Receiver and Manager?

C. Law and Argument

i. abridgement of time

11. The relief sought in this motion is pursuant to the BIA and therefore the *Bankruptcy and Insolvency General Rules* supersede the *Nova Scotia Civil Procedure Rules* in the event of any inconsistency. BIA Rule 3 states:

> In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

12. As this is a matter where the BIA does not specify a minimum notice requirement, BIA Rule 6 applies, which states:

> 6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.
>
> (2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

13. In terms of measuring the four days provided under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days.

14. If a period of less than six days is provided for the doing of an act or the initiation of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

15. In accordance with BIA Rule 6(1), the motion materials will be served electronically by email. Proof of service by affidavit will be filed in advance of the hearing of the pending motion.

16. Although BDC anticipates filing and serving the Motion pleadings within the foregoing timeline, it has included a request for the abridgment of time in case there is any breakdown in service. BIA 6(4) grants the Court authority to amend these time limits, including to reduce them.

17. Given the nature of the relief sought and the surrounding circumstances, BDC submits that this is an appropriate circumstance for the Court to abridge the time for the hearing of this matter if such abridgement is not granted.

ii. purpose and object of 244 notice

18. The requirement to provide a debtor with a notice of intention to enforce security prior to applying to the court to appoint a receiver is set out in section 243(1.1) of the BIA:

> In the case of an insolvent person in respect of whose property a notice is to be sent under section 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) The court considers it appropriate to appoint a receiver before then.

19. The cases that led to this ten-day notice period have their genesis from the Supreme Court of Canada decision in *R.E. Lister v. Dunlop Canada Ltd.*, [1982] 1 SCR 726 [Tab 1]. The purpose of this ten-day notice period was to provide a safeguard to debtors from abuses of power by secured creditors.

20. The object of section 244 is clearly to bring home to a debtor that a creditor intends to enforce a certain security and to afford the debtor some opportunity to forestall or avoid such enforcement. In other words, the purpose of a 244 notice is to provide a debtor with an opportunity to react, to negotiate and to reorganize its financial affairs. See, *CBJ Developments Inc. v. 1180554 Ontario Limited* 2023 ONSC 6773 at paras 19-20 [Tab 2].

21. On April 7, 2026, the ten-day demand letter was forwarded by regular and registered mail to the president of the company at the address provided to BDC and the mailing address on property on-line for the Property. It provides the amount involved, the nature of the security and that BDC will not proceed until the ten-days expires.

22. Deloitte was appointed following the ten-day notice period on April 24, 2026, and this motion is subsequent to that appointment. The object and purpose of section 244 has been met and BDC respectfully submits that it complied with the above provisions such that proper notice has been provided to the Company.

iii. appointment of a receiver

23. Section 243(1) of the BIA provides for the appointment of a receiver. Specifically,

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

24. Section 43(9) of the *Judicature Act* also provides for the appointment of a receiver. Specifically,

> **(9)** A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

25. This Court can appoint a receiver where it is "just and convenient" to do so. The factors a Court may consider when determining whether it is just and convenient to appoint a receiver are well established.

26. In *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Edwards, J., set out the factors to be considered in an application to appoint a receiver [Tab 3]:

> In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell: Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) the nature of the property;
>
> (d) the apprehended or actual waste of the debtor's assets;
>
> (e) the preservation and protection of the property pending judicial resolution;
>
> (f) the balance of convenience to the parties;
>
> (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i)the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) the effect of the order on the parties;
> (l) the conduct of the parties;
>
> (m) the length of time that a receiver may be in place;
>
> (n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.

27. The Court in *Enterprise Cape Breton Corporation, supra,* further held that considerable weight to appoint a receiver is given to a creditor if it has the right to appoint a receiver in its security when it stated:

> In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc. , finding at paragraph 42 that:
>
> > [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.
>
> The court in *Bank of Montreal v. Sherco Properties Inc.* offered the following reasons for its decision at paragraph 47 below:
>
> > [47] I have reached this conclusion for the following reasons:
> >
> > (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
> >
> > (b) the terms of the mortgages permit the appointment of a receiver upon default;
> > (c) the value of the security continues to erode as interest, and tax arrears continue to accrue;
> >
> > (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands.

> It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

28. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed. It is also not necessary for a creditor to "check all the boxes" with respect to the above referenced factors as noted by the Court in *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 [Tab 4]:

> [53] It is not necessary to "check all the boxes" with respect to the factors noted in *Enterprise Cape Breton* in order for the Plaintiff to succeed. Indeed, not all of these factors will be applicable to every case. Those that do apply in a given situation will also vary to some extent in the weight to be assigned to them. Conversely, in some cases, there will be additional factors which may militate for or against the remedy sought. The list is not exhaustive.

29. In *Royal Bank of Canada, supra*, the Court considered the following when determining whether a receivership order should be granted:

> (a) the nature of the receivership sought;
>
> (b) whether the companies were "insolvent persons" within the meaning of the BIA; and
>
> (c) whether the relief sought was just and convenient.

30. In this application, BDC seeks the Court-appointment of Deloitte as Receiver and Manager. The distinction between a Court-appointed and private receiver was discussed by the Court in *Enterprise Cape Breton Corporation, supra:*

> The authors of The *2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. […]

31. In *First National Financial GP Corporation v 3291735 Nova Scotia Limited*, 2018 NSSC 235, the applicant was a first priority secured creditor seeking the appointment of a receiver over the property, assets, and undertakings of the respondent. The Court considered relevant authorities that interpret elements of the "just and convenient" test for appointing a receiver, stating as follows at paragraph 14 [Tab 5]:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CanLII 8258 (ON SC), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:
>
> > [10] The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 1984 CanLII 2343 (SK QB), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49. 45.

32. The Court considered the following factors in reaching its conclusion that it was just and convenient to appoint a receiver (paragraph 12):

> (a) the applicant held first priority security over the respondent's real and personal property;
>
> (b) the respondent was in default of its obligations to the applicant;

> (c) the applicant made demand for payment on the respondent and issued a Notice of Intention to Enforce Security pursuant to the BIA;
>
> (d) both the demand letter and the Notice of Intention to Enforce Security had expired, without payment being made;
>
> (e) the applicant was in a position to enforce its security as against the respondent should it choose to do so;
>
> (f) the appointment of a receiver would allow for the respondent's property to be preserved and protected pending liquidation; and
>
> (g) a receiver, as an officer of the court, would provide transparency and reassurance to the respondent's creditors that the liquidation of the property would be handled expeditiously and in a commercially reasonable manner.

33. In *Romspen Investment Corporation v 1514904 Ontario Ltd,* 2010 ONSC 832 [Tab 6], the applicant commenced an application for the appointment of a receiver pursuant to s. 243(1) of the BIA in respect of its first mortgage over the real properties and a security interest over the personal property of all the respondents. The property involved the development of a subdivision and the Court noted that time and money were needed to make the property ready for market. The Court found that the developer was under-capitalized and did not have the resources to put towards the debt (at para 15).

34. The Court employed a just and convenient assessment and stated the following at paragraphs 16 and 17:

> The just and convenient assessment involves consideration of the interests of lender and borrower. The wrap around financing in 2006 was such that the respondent had to know at the time that in the event of default and enforcement a receiver would be advanced. The number and nature of properties, the subdivision agreements, the involvement of the municipality, the second mortgage suggests that enforcement on a piecemeal basis is contraindicated. The fact that the second mortgagee under the direction of a guarantor to the instant indebtedness supports the appointment suggests that they, too, have seen equity evaporate and are concerned that this development is near or past the point of repayment in full. The principals and investors in the second mortgagee

> are familiar with the Almonte market and their support for the application is a significant factor.
>
> The developer respondents are insolvent. They owe more than $1K and are unable to pay. The first mortgage has been in default since July 2008. The developer respondents are unable to allocate any proceeds of commercial rent to the secured creditors as the rent is consumed by monthly expenses of operation.

35. The Court appointed the receiver at paragraph 19:

> In the instant case as opposed to the circumstances in Fisher/Nusbaum there is advantage to bringing in a receiver to direct the resolution of the outstanding debt. The status quo is untenable even in the short term. There is a daily erosion of equity if there is any. If there is not, it is the second and unsecured lenders who are being compromised. A receiver is a significant intrusion but is clearly the most efficient in a difficult situation. It does not mean the end of the development. It does result in an orderly liquidation of assets bearing in mind the best interest of all parties and when required subject to court approval. The respondent developer is not precluded from obtaining alternate financing. The representation made is that the developer may be able to implement a refinance in 30 days.

36. BDC submits that the above authorities establish the test for the appointment of a receiver pursuant to s. 243(1) of the BIA and section 43(9) of the *Judicature Act*. An application of the legal test to the facts in this matter will be set out below.

37. It is respectfully submitted by BDC that the factors considered by the Courts weigh in favour of the granting the order sought. In particular:

    (a) BDC holds a first priority mortgage and assignment of rents over the real property of the Company, and has the right to appoint a receiver pursuant to its mortgage which states at 12(d) on the occurrence of an Event of Default, the Bank may appoint a receiver or a receiver manager of the lands …

    (b) the Company is in default of its obligations to BDC;

(c) the demand letter and notice to enforce security were sent and the ten-day notice period has expired;

(d) the Company made a proposal to BDC which was rejected;

(e) the value of BDC's security continues to erode, as principal, interest and real property taxes continue to accrue;

(f) any enforcement and sale by BDC of the Company's real property in the face of undetermined Canada Revenue Agency liabilities poses a serious risk to BDC, as a priority could be claimed by CRA;

(g) The Company is not cooperating with Deloitte and, as a result, a Court-appointed Receiver and Manager is required to collect the rents and sell the real property;

(h) there are numerous creditors with security interests registered against the Property. If appointed as Receiver and Manager, Deloitte, as an officer of the Court, will have a fiduciary duty to all such creditors which in turn will provide transparency and reassurance to the Company's creditors that the liquidation of the property will be handled in a fair and commercially reasonable manner.

D. Conclusion

38. Considering all of the above factors, BDC respectfully submits that it is both just and convenient that Deloitte be appointed Receiver and Manager with the powers set out in the draft Order filed with the application documents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June 2026.

BOYNECLARKE LLP

Joshua J. Santimaw